Supreme Court, U.S.
FILED

(1)

No. 95- 95 1545 FEB 22 1996

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term 1995

ROY F SUTTON

Petitioner,

v

HON. ANTHONY L GIBSON, HON. CHARLES R PREVITI, PERSKIE & NEHMAD A PC, PHILIP J PERSKIE, ESQ., FREDRIC L SHENKMAN, ESQ., CO-EXECUTOR RONALD W SUTTON, INDIVIDUALLY AND AS CAPTAIN, ACPD, CO-EXECUTOR LORETTA E SUTTON, INDIVIDUALLY and THE ESTATE OF ROY C SUTTON.

RESPONDENTS.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

(1). Whether the ROOKER/FELDMAN Doctrine is amenable to, or controlled by, Section 1738, U.S.C.A. , Title 28 qualifications respecting collateral attacks.

(2). Whether the Third Circuit's dismissal of Section 1983 U.S.C.A., title 42 causes of action against private individuals acting in concert with state officers, immune and non-immune, is a denial of due process rights generated by said statute and as also expounded upon by this Supreme Court.

(3). Whether the ROOKER/FELDMAN Doctrine may be applicable to, or extended to, Section 1983 causes of action against state actors, although not judicial officers, for causes of action filed concurrently with Section 1983 causes of action against state Judges.

PARTIES AND RULE 29.1 STATEMENT

All of the parties who participated below are set out in the caption.

Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Roy F. Sutton, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Third Circuit Court of Appeals , entered in this proceeding on January 5, 1996

OPINIONS BELOW

The unreported affirming order of the Third Circuit is appended hereunto at 7a (APP). Pertinent excerpts of the unreported ruling of the District Court of New Jersey is appended hereunto at pp 1a-6a (APP).

JURISDICTION

The affirming order of the Third Circuit was entered on January 5, 1996. Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254(1)

STATEMENT OF THE CASE

This case arises from the respondents' actions seeking, and being granted, two injunctions from two different divisions of the Superior Court of New Jersey, each being entered without jurisdiction, and as pled, each being wrongful in nature; and also, two different colorable property deprivations as being effect ed by a municipal police captain, acing under color and in concert with private actors.

Petitioner sought federal remedy, protection by filing suit in the District Court of New Jersey, under jurisdictional authority of Sections 1331 and 1343(a)(3) of Title 28 U.S.C.A.. Section 1983 remedy was sought against the State Judges and those private actors, in concert, for the issuance of the injunctions. INJUNCTION ONE was entered without jurisdiction as being transferred to the Appellate Division

of said Superior Court, ordering petitoner to accept court imposed contract terms. INJUNCTION TWO was entered, again without jurisdiction, forbiding petitioner to relitigate matters already litigated. Petitioner had sought to reopen a court judgment based upon fraud, on private parties and also on the court, as being in contravention of the estate section of the Internal Revenue Code.

Concurrent with two injunctions, remedy was sought against municipal police captain, in concert with private attorney, for two different colorable property deprivation, as to keeping petitioner locked out of his property and from preventing the exercise of an owned liquor license related to said property; as being justified by allegations of indictable offenses against petitioner: going on a public shooting spree with a handgun. The jurisdictional municipal authority cleared petitioner of all charges.

Upon filing federal suit, the Superior Court of New Jersey, on application of those private actors pled; issued a Show Cause Order seeking to hold petitioner in contempt of court for filing federal suit. Fines and Jail were sought against petitioner. Upon dismissal by the District Court, respondents withdrew their contempt application, as being mooted by complaint dismissal.

The District Court dismissal was predicated on: private actors are not acting under color for 1983 purposes (APP 1a); judicial immunity (APP 4a); failure to exercise a state-level appeal (APP 4a-5a); comity (APP 4a) and the ROOKER/FELDMAN Doctrine (APP 6a).

Jurisdiction of the Court of Appeals was predicated upon Title 28 U.S.C.A. Section 1291, wherein two ponts were argued, to no avail:

POINT ONE: THE DISTRICT COURT ERRED BY GIVING FULL FAITH AND CREDIT TO JURISDICTIONALLY DEFECTIVE, VOID STATE COURT JUDGMENTS SO AS TO DENY SUBJECT-MATTER JURISDICTION UNDER ROOKER/FELDMAN.

and

POINT TWO: THE DISTRICT COURT ERRED BY APPLYING THE ROOKER/FELDMAN DOCTRINE TO THOSE CAUSES OF ACTION NOT INVOLVED WITH AND INDEPENDENT OF ACTIONS AGAINST STATE COURTS.

On appeal, petitioner argued that under New Jersey Law, judgments entered without jurisdiction are void, subject to collateral attack which should prevent the invocation of the ROOKER/FELDMAN Doctrine, under authority of ROOKER , itself, and with further reliance upon and cites to authorities of this Court and also of other circuits.

On october 18, 1995, petitioner filed a motion to strike Attorney Shenkman's opposition Brief for failing to comply with FRAP 30(b) and also within, a request for a 15 day filing extension for a Reply Brief, if strike was denied. Essentially, appellant/petitioner sought to strike Mr. Shenkman's COMBINED STATEMENT OF THE CASE AND FACTS , of nine pages , for failing to cite the record below, save for two references, and for insisting that mooted filings be submitted to the Court of Appeals within his opposition papers. (APP 6a)

Motion was denied on Jan 3, 1996 with no filing extension being granted for Reply and the actual affirming order was entered two days later, on Jan 5, 1996.

REASONS FOR GRANTING THE WRIT

As national policy maker, this Court should express a pronounced interest in matters, issues of federal jurisdiction and of federal remedy against colorable deprivations; and also of the State's ability to evade all federal review of colorable deprivations, by and through its courts, through preclusive application of state court rules.

I. GRANTING PRECLUSIVE EFFECT TO A VOID, AND UNAPPEALABLE, STATE COURT JUDGMENT SQUARELY, AND DIAMETRICALLY, CONFLICTS WITH DECISION OF THE NEW JERSEY SUPREME COURT AND ALSO WITH THIS COURT'S MARRESE AND ALLEN

During the course of appellate review, jurisdiction; the Atlantic County Superior Court, Law Division, entered an injunction against petitioner imposing court ordered contract terms without petitioner's consent and also contrary to appellate jurisdiction.

Also during the time frame of appellate jurisdiction, the appellees, therein, filed suit against petitioner, herein, seeking , and being granted, another injunction which essentially denied court access available under N.J. Court Rule 4:50-1. This second injunction, entered by the Chancery Division of the Atlantic County Superior Court, also ignored appellate jurisdiction and also New Jersey's Entire Controversy Doctrine, although the latter is not an issue before this Court. Essentially and if warranted, both injunctions should have been sought through the one proper jurisdictional forum, appellate.

A display of New Jersey Law may help to illuminate the conditions warranting injunctive relief, in contrast to events herein; " An extraordinary remedy.....administered upon considerations of justice, equity and morality", N.J. STATE BAR ASSN V. NORTHERN NJ MORTG ASSOC. 22 N.J. 184 (1956) AT 194.

Under New Jersey Appellate Rule 2:9-1, the filing of a Notice of Appeal is an event of jurisdictional significance. (see Rule 2:9-1 and comments APP 8a) . The New Jersey Supreme Court has also ruled accordingly with the divesture of authority, jurisdiction to act by a lower court, once Notice of Appeal has been filed: IN RE PLAINFIELD WATER CO 14 N.J.296 1954. This ruling has been consistently reiterated by the New Jersey Appellate Division. \Furthermore, the New Jersey Constitution's Article 6, Section 3, Clauses 3 & 4 display the jurisdictional distinction between the Appellate Division and the lower Law and Chancery Divisions.

Both this Court, and also the New Jersey Supreme Court, have ruled that judgments entered without jurisdiction are void and are subject to collateral attack. Early on and as a consistent string: LESSEE OF HICKEY V STEWART 44 U.S. 750, 1845; THOMPSON V WHITMAN 85 U.S. 457, 1873; WESTFIELD TRUST CO V COURT OF COMMON PLEAS 115 N.J.L. 86, 1935; and JAMES V FRANCESCO 61 N.J. 480 , 1972, as being legal nullties: RESTATEMENT JUDGMENTS 2ND SECTION 12, COMMENT (B); and FREEMAN, LAW OF JUDGMENTS, SECTIONS 322 & 333.

The affirming Third Circuit ignored petitioner's argument under this court's MARRESE V AM ACAD OF ORTH SURGEONS 470 U.S. 371, 1985. Citing New Jersey Law, the injunctions were entered without jurisdiction and were hence void and under MARRESE, those judgments are not to be given preclusive effect, nor to barrier a federal collateral attack.

There exists further compelling support within this Court's holding of HARING V PROSISE 462 U.S. 306, 1983 respecting a 1983 cause of action; and as followed by other Circuits in: LEWIS V FELICIANNA PARISH SCHOOL BD 820 F2d 143 1987 (CA5), GAUTHIER V CONTINENTAL DIVING SVCS 831 F2d 5591987 (CA5) and CHARCHENKO V CITY OF STILLWATER 47 F3d 981 1995 (CA8).

Petitioner sought protection and remedy under 1983, enacted by Congress which also enacted Section 1738 and directed that state preclusion rules apply as in this Court't: ALLEN V McCURRY 449 U.S. 90 , 1980, respecting 1738 application to 1983 causes of action.

As further argued to the Third Circuit, a judgment entered without jurisdiction, being void, is unappealable under New Jersey Court Rules as being no judgment which would further evade review by this Court under SECTION 1257 TITLE 28 U.S.C.A. citing: FLYNT V OHIO 451 U.S. 619, 1981 and COX BROADCASTING CORP V COHN 420 U.S. 469, 1975 with each cite qualifying, under this very court's standards, those state judgments reviewable by this Supreme Court. The state courts' actions, herein, are not reviewable by the U.S. Supreme Court!

The argument further pointed out that giving preclusive effect to a void state judgment, essentially invoking subject-matter dismissal (as herein); would evade all federal review and would appear to contravene very principles of federalism and constitutional guarantees of due process. The argument was to no avail.

II. GRANTING SUBJECT-MATTER DISMISSAL UNDER ROOKER/FELDMAN SQUARELY,DIAMETRICALLY CONFLICTS WITH ROOKER AND ALSO THE FIRST, SECOND AND NINTH CIRCUITS.

While ROOKER V FIDELITY TRUST CO 263 U.S. 413, 1923 was relied upon by the lower courts for subject-matter dismissal, ROOKER, itself, qualifies those state court judgments that are to be given preclusive effect and that preclusion is qualified to jurisdiction, ROOKER at 415 and 416. ROOKER does not give blanket preclusion to all state judgments which is further in accord with SECTION 1738. The First Circuit has followed this line of reasoning in : MULLENS V U.S. 785 F. SUPP 216 ,1992 affirmed 976 F2d 724 , 1992.

parenthetically, it may help this Court arrive at a granting of petition to recall that in ROOKER at 414, the lower federal court was asked to declare, a jurisdictionally valid judgment, null and void which is in diametric contrast to the state judgement, herein, which is already null and void under New Jersey Law!

Funneling support exists within case law of the SECOND and NINTH Circuits' case law respecting arguments for judicial immunity, which was also a dismissal ground in the lower federal courts. Both MAESTRI V JUTKOFSKY 860 F2d 50, 1988 and RANKIN V HOWARD 633 F2d 844, 1980 insight the qualifications for judicial immunity: "Judge will be denied judicial immunity only where it appears he acted in clear absence of jurisdictiona and clearly knew of the absence"

Both state court Judges were given formal, frequent, knowledge of transfer of jurisdiction to the Appellate Division. Both ignored and acted contrary to notice. Liciferously, both Judges have lost their immunity and it would logically follow that loss of immunity would symbiotically transfer preclusion denial.

Both Circuits above authoritatively cited this Court's BRADLEY V FISHER 80 U.S. 355,1871. petitioner cited legal precepts of lost jurisdiction and lost immunity to the lower courts, with authoritative cites, to no avail. Again and as before, usurped authority by state judges, acting out of jurisdiction (APP 5a), should generate federal jurisdiction, remedy and also a willingness to exercise the same.

Impressing two wrongful injunctions upon petitioner falls within due process denials under this Court's : DAVIDSON V NEW ORLEANS 96 U.S. 9 and GLIDDEN V HARRINGTON 189 U.S. 255, 1903 respecting the district Court's comity reliance.

III. DISMISSING SECTION 1983 CAUSES OF ACTION AGAINST PRIVATE PARTIES ACTING IN CONCERT WITH STATE ACTORS SQUARELY AND DIAMETRICALLY CONFLICTS WITH THIS COURTS' PRICE, DENNIS AND LUGAR.

The lower courts ruled that private parties are not state actors for 1983 purposes (APP 1a, 2a & 6a). Petitioner would argue that private individuals acting in concert with state actors are amenable to 1983 causes of action as was held by this Court: U.S. V PRICE 383 U.S. 787, 1966 and LUGAR V EDMONDSON OIL CO 457 U.S. 922 1982. These holdings squarely apply to suit at bar respecting private parties obtaining wrongful injunctions and locking out petitioner from his property.

While petitioner maintains prior position respecting lack of immunity for actions taken absent jurisdiction, this Court's holding in : DENNIS V SPARKS 449 U.S. 24 , 1980 squarely applies to circumstances at bar. in DENNIS,

suit was dismissed against the state judge ecause he was acting within his jurisdiction and also as to immunity ,at 24; however, suit was maintained against the private parties, and parenthetically, the actions of the state judge therein were also appealable-----in contrast to circumstances of suit at bar where the injunction would be unappealable because it was entered without jurisdiction.

The Third Circuit has clearly, flagrantly disregarded the authority of this Court and has denied petitioner available federal remedy.

IV. EXTENDING SUBJECT-MATTER DISMISSAL , UNDER ROOKER/FELDMAN, FOR SECTION 1983 CAUSE OF ACTION AGAINST A MUNICIPAL POLICE CAPTAIN DIAMETRICALLY DEPARTS FROM ROOKER AND ALSO DENIES REMEDY EXISTING UNDER SAID STATUTE.

Petitioner pled two colorable deprivations against a municipal police captain and a private attorney acting in concert. Although those two COA's were also filed in the same complaint with the two COA's against state judges for their wrongful injunctions, the Counts against the municipal police officer were in no way involved with the State Courts' nor was petitioner seeking any review, appellate function of those actions by state judges within those Counts cited.

ROOKER V FIDELITY TRUST CO 263 U.S. 413, 1923 clearly applied to state court actions. A municipal police officer is not mentioned anywhere within the US Reports nor in any briefs filed by parties to this Court. Petitioner is unable to locate any other reported federal suit where ROOKER was extended to any subject other than a state court. More often than not, Section 1983 suits are directed at abuses by

municipal police officers. The Third Circuit has seen a string of 1983 suits against the City of Philadelphia for abuses by its police force. The same is perhaps more notoriously true for the City of Los Angles.

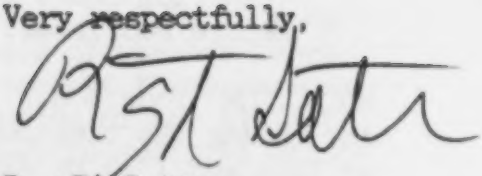
Petitioner filed timely suit for colorable deprivations under Section 1983. There exists no basis of law for dismissal. The Third Circuit's ruling herein clearly demonstrates independence of , and a disregard for, binding authority.

MONROE V PAPE 365 U.S. 167, early on an clearly, addressed the purpose of the CIVIL RIGHTS ACT and the congressional intent to provide a federal remedy. "In short, federal courts could step in where state courts had been unwilling or unable to protect federal rights", at 173-174. There was no valid reason for the Third Circuit to deny petitioner remedy and that it did so , justifies and warrants action by this Supreme Court.

CONCLUSION

That a complaint is captioned as civil does not make the actions complained of therein civil in themselves. Petitioner's rights and property have been ruinously, egregiously trampled under authority of, in concert with the State in contravention of FOURTEENTH Amendment guarantees. The Third Circuit has cavalierly disregarded mandate of law by denying petitioner federal protection, remedy. As propounder of national conscience, this Court should exercise discretionary jurisdiction and safeguard clear mandate of public policy by granting summary reversal.

Very respectfully,



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Excerpts of Opinion of
District Court of New Jersey
Before Rodriguez, J. on 4/20/95

MR SUTTON: Your Honor, first of all thank you for taking the time out of your schedule to hear this and I'll be exceptionally brief because I am inclined to belive this issue turns over jurisdiction more than anything and your interpretation of filing of a notice of appeal. I allege that the filing of a notice of appeal deprives the lower courts of jurisdiction and hence the orders that they entered were entered without jurisdiction. And before we go any further, do you have any feelings on that, your Honor, on the effective notice of appeal?

THE COURT: Yes, go ahead.

MR SUTTON: If the notice of appeal deprived them of jurisdiction , then I believe I've prop erly invoked this court's jurisdiction: but if not, then ROOKER/FELDMAN bars this court from hearing it if their order is entered with juris diction. And I don't know how you feel about th at your Honor.

THE COURT: Mr. Sutton , my concern with jurisdiction essentially is this, that your complaint is styled under a 1983 action. Now, without getting into the essential complexities of 1983, basically 1983 is not the cause of act ion but 1983 requires that there be a view to the actors of the concern to determine whether they meet the standards for 1983. To the extent that individuals that are named are not statement actors, the attorneys that are involved, they cannot be the appropriate subject of a 1983 action. It takes state actors depriving an individual of a constitutional right. 1983 allO ws you to look for that constitutional right th at's being violated and bring it within a civil

context. To the extent of my reading the complaint and all of the actors that are involved. They're not statement actors. So I am looking at jurisdiction on the basis of whether there is jurisdiction for 1983 against these persons to begin with at the inception of the litigation. To the extent that they're judicial officers functioning in a judicial capacity there is immunity. So, if we look at the two judges and say well, there is immunity for the judges, the others are not state actors, there is a serious question of jurisdiction. Not simply because, well, was there an appeal? Were they deprived of an appeal? Because all that could be taken as an additional appeal within the state system But where then is the essence of the jurisdiction for this court to function under 1983,which is the only method that you would have to be here in a constitutional basis? That's my question. What is your constitutinal jurisdictional basis.

MR SUTTON: I felt as though the constitutional jurisdictional basis, your Honor, was that they wrote---the judge wrote an order without jurisdiction. The jurisdiction was taken from the lower court and was with the Appellate Division He rewrote a contract for me without jurisdiction and wrote another injunction against me without jurisdiction, your Honor. So, I believe that in itself was a constitutional deprivation an order without jurisdiction.

THE COURT: Well see, the question is did the court have jurisdiction to do what it was doing under the circumstances? Now, there were two other occasions when you were before this court and we did write rather extensive discussion wi th respect to jurisdiction in those cases.Isn't this case dealing essentially with the same sub ject matter?

MR SUTTON: Those orders revolved around or-- I understand what your're saying, your Honor. The order, there was a valid order by a lower court there was no appeal taken from it. When it wrote the order it had the jurisdiction to write the order, your Honor. When these orders were written, jurisdiction was taken and put into the Appellate Division and I felt as though that was the basis for a constitutional----

THE COURT: well, isn't that the reason why if you feel that's the basis of attacking that state action by the court within the court, state jurisdiction, by appealing what appears in your judgment to be usurping the jurisdiction of the Appellate Division or function out of jurisdiction when the Appeallate Division is involved? I mean, you haven't questioned his jurisdiction on that argument with the Appellate Division, have you?

MR. SUTTON: Have I appealed the jurisdiction ? No, your Honor, I was under the impression that a 1983 cause of action wouldn't require a state appellate jurisdiction or an exercise--.

THE COURT: You see, here's one of the difficulties. There are several cross current concerns. One is the purest thought of jurisdiction itself is there jurisdiction for this court even to consider, and we were here essentially for injunctive relief, but for injunctive relief the first thing you look at-----is whether there is the chances of success of the moving party, you know, how clear is it or how probable is it that the plaintiff will succeed in the underlying case in order to meet the first standard for injunctive relief. Jumping from that now to jurisdiction where one of the essential problems is the question of jurisdiction, in 1983 in looking at what the courts are doing here under ROOKER Versus FELDMAN, they appear

to be functioning within their judicial capacity. Now you're saying because notice of appeal was filed he had no jurisdiction. That would be the reason to question within the state system what it is he did on appeal, rather than attemp ting to use this court as an appellate review of what the judge is doing there before the act ion is finished. The other is the policy question which involves a certain amount of COMITY, respect for the state system that when they're engaged in litigation, unless it's a very clear issues of constitutional right, not to jump into that situation before it'ts resolved within the state structure. So that a court can then look to see what has occurred to better dissect whether there is a jurisdictional question. Then you have the third problem. The third prob lem is that because they are functioning in what appears to be a judicial capacity, issuing orders that have not been appealed, they are prima facie functioning as a court, as a court they have immunity. So there would be no, maybe not a direct question of jurisdiction, but an obvious block against proceeding against a cou rt that has immunity. That then leaves all the others and the others are not state actiors. Not being state actors, there is no 1983 action. So, I look at this as one where it's not simply a matter of is this an appropriate area for an injunction, there is a serious question as to whether this lawsuit can even be maintained under 1983. And that's why I ask you what is your constitutional basis. You say well he acted without jurisdiction because there was an appeal. The order is not appealed from and it should be so that the state can correct its own problems. Now, that's why it's still being litigated within the state system where a federal court hesitates getting involved in the middle of it, let alone attempting to enjoin a judge who has issued an order to show cause. And that was my concern and that't why I asked that question. Unless there is a clear answer,

I see that there is no basis for this court to retain jurisdiction over the entire matter.

MR SUTTON: That´s why I raised it immediately, your Honor, on how you felt, what the ruling would be on this notice of appeal. And that´s why I raised it immediately because from what I can see it is a jurisdictional issue and it has to be resolved first. I understand that, your Honor,. I was just under the impression that filing a notice of appeal would take jurisdiction from the lower court, whereas they would have no jurisdiction whatsoever to act and the writing of that order would be essentially without jurisdiction.

THE COURT: Yes. But, see, it a an unappealed order and the fact that they rendered an opinion or created an order--- and one of the orders as I remember reading the file there is simply a stamp that says it´s consistent with the bench opinion issued on such and such a date. So, what the orders are doing, the orders are incorporating the discussion that takes place in the courtroom. So, a court in attempting to render a judicial act, for instance like I´m doing here now, if you disagree with it or if I have no jurisdiction, it´s a matter for appeal. It may not be a matter, unless the appellate Court has determined that I acted without jurisdiction , to start a constitutional claim againm st a state judge who is doing it in what purports to be a judicial manner; orders to show cause. He´ functioning as a judge. And if he´s out of jurisdiction, that should be the appeal process within the state. How can he try to do this when he didn´t have jurisdiction? and the state then corrects its own problems before a federal court starts giving it constitutional measurement. Habeas corpus matters, right, a fellow hasn´t exhausted his state remedies, we don´t hear it. The state has an opportunity

first to completely act, then you look at it and say well, here's where it lacks jurisdiction. But the ROOKER/FELDMAN doctrine is pretty strict in the sense that if it appears to be a judicial action, your don't get involved, let alone that there is immunity if they attempt to function as a court. So you know, it's unfortunate that we have to inconvenience a lot of persons to be here today, but I'm happy to see that you do recognize it as a jurisdictional question.

MR SUTTON: You know, court time is valuable, I recognize that. I wouldn't be here if I didn't think that it was a valid viewpoint and that's why I raised it immediately, once again, on how you felt about it.

THE COURT: Well, I can understand that. And simply what I will do then is that I'll make reference to the fact of our discussion here today, but I will be entering an order dismissing this case for lack of jurisdiction, and for many of the same reasons that were expressed in our judgment orders that have been entered in the past. Because in each one, as you can see, they're looking at jurisdiction. No matter how gross an individual treats you, it's not a 1983 action unless there is a state actor; and they're not , judges have immunity, so that it's a hard road to hoe to come in under 1983 under the circumstances of this case. But, the ultimate judgment there could be left for anoth er day. But these pleadings, I feel, as they're written here now lack sufficient subject matter jurisdiction for me to continue to entertain the lawsuit.

MR SHENKMAN: Judge, just one procedural matter. The Deputy and I have both filed 12(b) motions which are returnable sometime. Of course both are moot, I just wanted to alert your Honor so you don't bother scheduling it for the motion day.....(proceedings subsequently ended)

Filed: 1/5/96

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5401

ROY F SUTTON,

APPELLANT

V

ANTHONY L GIBSON, HONORABLE;CHARLES R PREVITI; HONORABLE; PERSKIE & NEHMAD, A PC; PHILIP J. PERSKIE,ESQ; FREDRIC L SHENKMAN, ESQ; RONALD W SUTTON, CO-EXECUTOR AND INDIVIDUALLY; LORETTA E SUTTON, CO-EXECUTOR AND INDIVIDUALLY, THE ESTATE OF ROY C SUTTON.

APPELLEES

BEFORE: MANSMANN, ALITO and ROTH,Circuit Judges

ORDER

After consideration of all contentions raised by the appellant, it is:

Adjudged and Ordered that the judgment of the district court be and is hereby affirmed.

By: /s/ Carol Los Mansmann
Circuit Judge

NEW JERSEY COURT RULE 2:9-1(a)

Control prior to appellate disposition. The supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of perition for certification filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to R 1:10 and as otherwise provided. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

COMMENT--1. Para (a).....Except to the extent of enforcement and except as otherwise expressly provided for by rule, the ordinary effect of the filing of the notice of appeal is to deprive the court below of jurisdiction to act further in the matter under appeal unless directed to do so by the appellate court..... Appellate litigants should, however, be aware of their recourse to a motion to the appellate court for a limited remand to the trial court pending the appeal where consideration of a particular issue by the trial court will enable full resolution of the controversy by the appellate court or is necessary to deal with an essential matter implicating the issues on appeal arising after the notice of appeal is filed It is, of course, clear that the Appellate Division's instructions to the trial court on remand are binding on that court.